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Lawyers' Dangerous Liaisons

Two recent decisions have changed the landscape of disqualification motions in successive representation cases

By ELLEN R. PECK

Cali!" rasped the familiar voice of Sidney Sideswitch. "I need to consult with you about another ridiculous claim of conflicts of interest!" California Joan had agreed to become Sid's ethics counsel when Sid started getting a rash of disqualification motions in his plaintiff's consumer rights practice.

"Before I started my own practice about five years ago, I worked in an insurance defense firm. I worked for the firm for about 10 years handling coverage work for Universal Insurance (Uni). I never did any litigation for them and certainly never handled any bad faith claims. I am now suing Uni for bad faith refusal to pay a claim for plaintiffs after their $3 million home burned in a wild fire in the hills. Uni's counsel, for tactical reasons, claims that I have a conflict of interest. Clearly, Uni cannot keep me from working for other clients by using this tactic, can they?" Sid asked.

"That's overbroad," Sid protested. "Any work, including the singular personal preparation of memoranda or taking a deposition, for a client could fit within that definition! It doesn't factor whether the time spent with the client was hundreds or thousands of hours or just a few."

Cali advised Sid about the effect of a relationship being found direct. "If the representation is direct, the court must presume that confidential information has passed to the attorney: the attorney is precluded from rebutting the presumption. If the relationship is peripheral or attenuated, the lawyer may present evidence that he/she did not receive confidential information during the former representation. (*Id.*, at 710-11, 3 Cal.Rptr.3d 877.)"

"This is a real change," Sid groaned. "Under the *Ahmanson* substantial relationship test, I could introduce evidence rebutting the presumption of confidentiality to show that my direct, personal services were so de minimis that no confidential information was acquired or that whatever confidential information I may have acquired is stale or useless or that the confidential information is no longer confidential."

In describing part two, Cali warned, "You're not going to like step two any better. Step two gives the similarity of the 'subject matter' of the current and former representations a broader interpretation. Step two is met 'when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.' (*Id.,* at 712, 3 Cal.Rptr.3d 915.)"

Sid continued his protest: "Almost any information learned from a client is material to the evaluation, prosecution, settlement or accomplishment of the representation. This is overbroad, too!"

Cali presented the other side. "This seems to be a policy shift towards broader protection of client confidential information. In addition to disqualification for having factually and legally similar material information, it also protects information about client attitudes, decision-making, practices and policies."

"It seems to me that the policy is moving toward protecting loyalty to past clients rather than confidentiality," Sid complained. "Once I have personally and directly represented a client, I may never be able to take an adverse position to that client. How far does this go? I am an expert for a plaintiff in a bad faith insurance case against Big Insureco. About 12 to 15 years ago, I handled some coverage work for Big Insureco, but I never handled any bad faith litigation for them. Big's counsel wants me disqualified. What are my chances?"

"In *Brand*, at 603-605, the Court of Appeal for the Second District, extended the *Jessen-Farris* test in disqualifying an attorney from serving as an expert witness in a bad faith/breach of contract case for the plaintiff against a former client insurance company for whom the lawyer had performed legal services 12 years previously," Cali said. "The lawyer-expert had directly handled 14 disputed coverage matters for the insurance company, supervised two or three of his firm's attorneys in handling additional cases for the insurance company. He also gave educational seminars to the insurance company's claims department on claims handling."

"But how were the coverage matters related to bad faith actions?" Sid asked.

"Citing *Farris*, at p. 684," Cali said, "the court found that handling coverage matters created subject matter similarity, observing: 'A coverage attorney's responsibility to his client includes advising the client on these subjects . . . Coverage disputes are substantially related to bad faith actions for the purpose of attorney disqualification because they both turn on the same issue — whether or not there is coverage under the terms of the policy . . .' (*Brand*, at 606)."

Cali added: "The court completely discounted the passage of time of 12 years between the last time the lawyer provided legal services and accepted the employment as an expert witness against the former client. (*Brand,* at 607.)

"If the trial court follows these cases, you will probably be disqualified in both cases, since you rendered personal and direct legal services to both insurance companies and since there is 'subject matter similarity' between the coverage matters you handled and the current bad faith case. Even if a trial court applied the *Ahmanson* test, your recent representation of the insurer in coverage matters is factually and legally similar to the current bad faith matters based upon *Brand*. Moreover, in your expert case, a trial court is likely to discount the passage of time, as did the *Brand* court," Cali advised.

Sid was silent for a moment. "I understand that the *Jessen-Farris-Brand* line of cases takes a broad view of protecting client confidentiality and that the two-part test may be easier for busy trial courts grappling with disqualification and attorney conflict issues to apply. The breadth of the test and discounting the passage of time as a relevant factor creates a great opportunity for me to seek disqualification of a number of firms who are my opponents. I may have to get out of a few cases, but the courts have handed me a powerful tactical tool to use as a disqualification spear. Thanks, Cali," Sid said as he hung up.

Doris Dewey of Dewey, Cheathem & Howe (DCH) called. "Cali, one month ago we agreed to defend ZYCO, which is being sued for wrongful termination by a former in-house counsel, Brigitte J'Oanes. J'Oanes claims that a DCH partner, Smythe, received her proposed employment contract, wrote comments on it and

gave her advice about the contract. At the time, DCH had just started representing ZYCO in other matters. We have no record of any file being opened for J'Oanes, no papers, documents or other files, no indication that any other lawyer in the firm was involved and no billing for any advice. Smythe left our firm three years ago. J'Oanes' counsel demands that we get off the case."

Cali responded, "I think I have good news. In *Goldberg v. Warner/ Chappell Music Inc*. (2005 [2d Dist. Div. 4]) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116), the law firm was not disqualified in a wrongful termination action where, six years earlier, the plaintiff-employee had briefly consulted with one of the law firm's partners concerning her contract with the employer and where the partner had left the law firm three years before the action was filed."

"What a coincidence! What did the case hold?" Doris asked.

"The court found that an attorney-client relationship between the employee and a former partner of the employer's attorney law firm had been formed concerning advice about the employment contract with the employer and that a conclusive presumption of confidentiality applied. But the presumed possession of confidential information concerning a former client did not automatically disqualify the employee's former firm, where the evidence established that no one other than the departed partner had any dealings with the client or obtained confidential information, and where the law firm had never opened a file for the employee; never billed her; had no notes or records in any file about the meeting; no documents were prepared; no telephone calls made; and the partner left several years before the instant litigation began (*Id*., pp. 755, 758)," Cali responded.

"But what about imputation of confidential information from the tainted partner to the rest of the firm?" Doris asked.

"Concerning imputation," Cali answered, "the court observed that when tainted attorneys and non-tainted attorneys work at the same firm, there is a 'pragmatic recognition that the confidential information will work its way to the non-tainted attorneys at some point.' When tainted attorneys and non-tainted attorneys have a past relationship, there is no need to rely on the fiction of imputed knowledge to safeguard client confidentiality; the court should then make a 'dispassionate assessment' of whether confidential information was actually exchanged. *Id.*, p. 765.

"The chances are good that you will not be disqualified, Doris," Cali concluded.

"The *Goldberg* case warned that if the departed partner had still been affiliated with the firm, the result would have been different. G*oldberg* demonstrates that unknown and undocumented legal services rendered by a member of the firm pose the risk of disqualification or other risks."

Cali proceeded to give some risk management tips:

"1. Lawyers should decline to give any advice to any potential client until a conflict check is run and the firm's procedures for client acceptance are followed.

"2. If a corporation is a current client, the firm may represent a constituent personally if the firm complies with CRPC 3-600(F) and 3-310.

"3. No lawyer affiliated with the firm should provide legal services to any client outside the firm, unless approved by the firm and all data is entered into the conflict-checking system.

"4. *Brand* teaches us that other types of professional activity (e.g., expert, arbitrator, mediator, corporate director services) by firm lawyers can create the potential for conflict and disqualification. All lawyer professional activities must be entered in a conflict-checking system.

"5. While ethics screens are tools widely used to wall off lawyers who might have some confidential information about a former teols wi hT8"re W n BTs9o confll,icesy

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ney working in the firm,Ó Cali said.

ÒWhat was the basis for the disqualification?Ó Chris asked.

ÒThe court opined that the attorneys placed themselves in a position of divided loyalties, i.e., their own financial interest in recovering attorneysÕ fees was pitted against their obligation to the putative class to maximize the recovery of monetary and other relief,Ó Cali explained. ÒThe court further held that the withdrawal of the law firm from representation of the class on appeal did not render the matter moot. The court also disqualified a second law firm that serves as co-counsel with the disqualified firm in other cases.Ó

ÒWhy?Ó asked Chris.

ÒThe second firm was disqualified from representing the class because of the close business connection between the co-counsel firm, the attorney-class representative and the firm in which he worked, including that there was a history of referring cases back and forth and class actions cases in which members of both firms served as class representatives,Ó Cali answered.

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1. Adverse successive representation occurs when a lawyer, currently representing a client, sues that client in a separate matter on behalf of another.

2.